INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	2
Argument	6
Conclusion	14
Appendix	15

CITATIONS

CASES:

Aircraft & Diesel Corp. v. *Hirsch*, 331 U.S. 752 ..... 6, 7, 9
Blanchard Machine Co. v. *R.F.C.*, 177 F. 2d 727, certiorari denied, 339 U.S. 912 7
Lichter v. *United States*, 334 U.S. 742 ..... 5, 6, 7, 9, 10, 11, 13
Lockerty v. *Phillips*, 319 U.S. 182 13
Macauley v. *Waterman Steamship Corp.*, 327 U.S. 540 ..... 6, 7, 8, 9
Murray's Lessee v. *Hoboken Land & Improvement Co.*, 18 How. 272 13
United States v. *Wissahickon Tool Works*, 200 F. 2d 936 12
Yakus v. *United States*, 321 U.S. 414 13

CONSTITUTION & STATUTES:

Constitution of the United States, Article III 13
Renegotiation Act, as amended by Title VII of the Revenue Act of 1943, 58 Stat. 78, 50 U.S.C. App. 1191,
Sec. 403(c)(1) 4, 5, 6, 13, 15
Sec. 403(c)(2) 2, 16
Sec. 403(c)(3) 3, 17
Sec. 403(e)(1) 6, 18

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 573

EDWARD VALVES, INC., *Petitioner*

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Indiana (R. 52-58) is reported at 101 F. Supp. 559. The opinion of the United States Court of Appeals for the Seventh Circuit (R. 71-78) is reported at 207 F. 2d 329.

JURISDICTION

The judgment of the Court of Appeals was entered on October 7, 1953 (R. 80). A timely petition for rehearing (R. 81-89) was denied on November 6, 1953 (R. 91). The petition for a writ of certiorari was filed on February 3, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner may raise, in a district court proceeding by the Government under the Renegotiation Act to enforce an administrative determination of excessive profits, the defense of lack of timely commencement of renegotiation, although petitioner failed to file a petition in the Tax Court for redetermination of its excessive profits.

STATUTE INVOLVED

The pertinent provisions of the Renegotiation Act, as amended, 58 Stat. 78, 50 U.S.C. App. 1191, are set forth in the Appendix, *infra,* pp. 15-18.

STATEMENT

The United States brought this action in the district court under Section 403(c) (2) of the Renegotiation Act (Appendix, *infra,* p. 16) to recover from the petitioner amounts determined by the Maritime Commission Price Adjustment Board and by the War Contracts Price Adjustment Board to be excessive profits for the fiscal

years ending December 31, 1942, 1943, 1944, and 1945 (R. 4-25). The complaint was in four counts, covering petitioner's contracts in each of the four years respectively. The question presented in this case pertains to the second count only, dealing with the year ended December 31, 1943. That count alleged that upon due commencement of renegotiation proceedings the Acting Chairman of the Maritime Commission made a unilateral determination, pursuant to the statute, that petitioner's excessive profits for the year 1943, under its contracts with the Commission, amounted to $1,286,000 (R. 6-7); that notice of this determination was mailed to the petitioner on March 19, 1946 (R. 7, 15-16); that on July 8, 1946, the War Contracts Price Adjustment Board notified the petitioner that the Board had adopted this determination (R. 7, 16-17); and that after allowance for tax credits of $1,028,800 petitioner was liable for the balance of $257,200, with interest (R. 7-8).

Petitioner in its answer (R. 25-39) alleged that notice of the commencement of renegotiation proceedings for the year ended December 31, 1943, was not received by it until May 5, 1945, more than one year after the end of the fiscal year in question, and that under Section 403(c)(3) of the Act (Appendix, *infra*, pp. 17-18), the failure to commence renegotiation within one year discharged petitioner's liability under the Act (R. 27-28). The petitioner attached to its answer a copy of the

notice of commencement of renegotiation, dated May 5, 1945 (R. 34). The petitioner also alleged, treating the Board's order of July 8, 1946, as the order determining the amount of excessive profits, that the order was not entered within one year of the commencement of renegotiation, as required by Section 403(c)(3) (R. 28).

Both parties moved for summary judgment (R. 40, 41). The petitioner had never availed itself of its statutory right to file with the Tax Court, within 90 days of the Board's order, a petition for redetermination of the excessive profits determined by the Price Adjustment Board (R. 28-29, 72); and the Government urged that, in the absence of a petition in the Tax Court for redetermination, the determination of the Board was, under Section 403(c)(1), "final and conclusive" (Appendix, *infra,* p. 15). The petitioner urged that a failure of the Board to make a timely commencement or a timely completion of renegotiation proceedings discharged the petitioner's liability, and that this defense, involving a question of law and affecting the petitioner's "legal liability," could be raised in the district court in an action to recover the amount determined by the Board to be excessive profits. The petitioner argued that a contrary construction of the Act's provision for finality of orders of the Board (if Tax Court redetermination was not sought) would deprive the petitioner of constitutional rights.

The district court granted the Government's motion for summary judgment and denied the petitioner's motion (R. 52-58). The court held that Section 403(e)(1) of the Act (Appendix, *infra,* p. 18) makes the Tax Court remedy the exclusive procedure for challenging determinations of the Board and that this was as true of a challenge based upon alleged failure to commence or to complete renegotiation within the time limited as of challenges raising questions of the coverage of the statute or of the amount of profits—issues of the latter type having been disposed of adversely to petitioner's view by this Court's decision in *Lichter* v. *United States,* 334 U.S. 742 (R. 55-56). While the Court recognized that broad questions of constitutionality of the Renegotiation Act on its face might be raised in a proceeding to enforce the Board's order (cf. *Lichter* v. *United States,* 334 U.S. 742), and that the question sought to be raised by the petitioner might be presented in a judicial proceeding to review a determination of the Tax Court, it refused to accept the petitioner's contention that the Tax Court procedure could be bypassed on nonconstitutional questions of law (R. 56-57).

The court of appeals affirmed (R. 71-78). It held that although the questions raised by the petitioner were questions of law they could have been presented to the Tax Court and that failure to pursue the Tax Court remedy barred the peti-

tioner from raising the questions in a proceeding to enforce the Board's order. The court relied on this Court's decisions in *Macauley* v. *Waterman Steamship Corp.*, 327 U.S. 540; *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U.S. 752; and *Lichter* v. *United States,* 334 U.S. 742 (R. 73-77).

ARGUMENT

The statutory issue raised by the petitioner is too narrow to warrant review by this Court; moreover, its disposition by the court below is clearly correct and conforms to the principles plainly laid out by the prior decisions of this Court. The asserted conflict on this issue between the decision below and that of the Court of Appeals for the Second Circuit does not exist. And the constitutional questions urged by the petitioner are insubstantial.

1. Section 403(e)(1) of the Renegotiation Act (Appendix, *infra,* p. 18) provides that a contractor aggrieved by an order determining its excessive profits may, within 90 days of the order, petition the Tax Court for a redetermination, and that the Tax Court "shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits." Section 403(c)(1) (Appendix, *infra,* p. 15) provides that in the absence of such a petition to the Tax Court the order of the Price Adjustment Board "shall be final and conclusive and shall not be subject to

review or redetermination by any court or other agency." It is settled by the decisions of this Court that, while the finality provision last quoted does not preclude a contractor from questioning the Act's constitutionality in a district court action by the Government to recover the amounts determined by the Board to be excessive profits (see *Lichter* v. *United States*, 334 U.S. 742, 774), on non-constitutional questions—including questions of coverage, amount of excessive profits, and the like—the Tax Court procedure must be invoked and exhausted before any judicial review may be sought. *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540; *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U.S. 752; *Lichter* v. *United States*, 334 U.S. 742.[1]

The petitioner concedes (Pet. 7, 9-10) that under these decisions questions of coverage (that is,

[1] It is unnecessary in this case, as in the cases cited, to decide (a) whether a redetermination by the Tax Court in accordance with the statutory procedure is reviewable either on direct petition to the courts of appeals for review or in some form of collateral attack, or (b) if the Tax Court's order is judicially reviewable, what is the extent and scope of the review. See *Lichter* v. *United States*, 334 U.S. 742, 791; *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U.S. 752, 771. The Court of Appeals for the District of Columbia Circuit has held that a question of timely commencement of renegotiation, such as that here involved, goes to the jurisdiction of the Tax Court and is therefore reviewable by the courts of appeals under the District of Columbia Circuit's view that jurisdictional issues are subject to full review on appeal from the Tax Court. *Blanchard Machine Co.* v. *RFC*, 177 F. 2d 727 (C.A.D.C.) certiorari denied, 339 U.S. 912.

whether a given contract is renegotiable within the meaning of the Act) and "non-judicial" questions of the amount of excessive profits may not be raised in a district court enforcement proceeding, but contends that this Court's opinions may not be read as applying the statutory provision for exclusiveness of the Tax Court remedy to questions which neither pertain to the amount of excessive profits nor involve issues of fact. The narrow issue raised by the petition is whether the rule laid down by this Court's opinions is so limited.

It is clear, from a mere reading of the Court's opinions, that the rule of finality is not so restricted and that the court below correctly held that questions of timely commencement or timely completion of renegotiation may not be raised in the district courts. Petitioner's argument that these questions were properly raised in the district court because they are issues of law is fully answered by the Court's statement in *Macauley* v. *Waterman S. S. Corp.*, 327 U.S. 540, 544, that:

> Congress intended the Tax Court to have exclusive jurisdiction to decide questions of *fact and law,* which latter includes the issue raised here of whether the contracts in question are subject to the Act. [Emphasis added.]

And it is equally plain that the exclusiveness of the Tax Court remedy is not limited to questions of the amount of excessive profits. In *Waterman,*

the Court, holding that the Tax Court was the exclusive forum for raising the issue whether the United States was a party to the contracts in question, expressly rejected the contention that the Tax Court remedy was available only on questions of the amount of excessive profits (327 U.S. at 544). And in *Lichter* v. *United States,* 334 U.S. 742, the Court held (334 U.S. at 754):

> By reason of the finality thus attached to the determinations made as to excessive profits in these cases, we do not pass upon the issues attempted to be raised here as to the coverage of the Act, the amount of the profits, *or other matters which the petitioners might have presented to the Tax Court but did not.* [Emphasis added.]

The questions of timely commencement and timely completion of renegotiation entered this case immediately upon issuance of the Board's order determining the petitioner's excessive profits. Accordingly, they "might have [been] presented to the Tax Court" (334 U.S. at 754), and all the reasons relied on by this Court in the *Lichter* and *Waterman* cases as well as in *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U.S. 752) for requiring exhaustion of the administrative remedy apply with equal force in this case. A Tax Court decision favorable to the petitioners would have

eliminated the need for the courts to pass upon the questions raised.

The type of issues involved here are fully comparable to those required in the earlier cases to be presented to the Tax Court. The Court said in the *Lichter* case (334 U.S. at 792):

> We uphold the decisions below and the contentions of the Government to the effect that the statutory provision thus made for a petition to the Tax Court was not, in any case before us, an optional or alternative procedure. It provided the one and only procedure to secure a redetermination of the excessive profits which had been determined to exist by the orders of the respective Secretaries or of the Board in the cases before us. Failure of the respective petitioners to exhaust that procedure has left them with no right to present here issues such as those as to coverage and the amount of profits which might have been presented there. Accordingly, there is excluded from our consideration in this proceeding the contention in the *Lichter* case that the petitioners' subcontracts were exempt from renegotiation on the ground that they were subcontracts under prime contracts with a Department of the Government and had been awarded to them as the result of competitive bidding for the construction of buildings and facilities. There is excluded

> also, for example, the contention in the *Pownall* case that petitioners' contracts which were for amounts under $100,000 each were not subject to renegotiation. Likewise, in the *Alexander* case, there is excluded the petitioner's contention that it had not made excessive profits within the meaning of the statute and that its contracts for processing wool were not "subcontracts" within the meaning of the Original Renegotiation Act.

The questions "such as coverage" there held to be exclusively within the province of the Tax Court to review were far broader than mere "non-judicial" questions as to amount of profits. The issues of timely commencement and timely completion of renegotiation involved here are no more basic than the issues which the Court refused to consider in the previous cases, and accordingly are no more deserving of review outside the statutory channels. Redetermination by the Tax Court is provided to reconsider whether the contractor received "any" excessive profits, and questions of timely commencement and timely completion of renegotiation, like the questions discussed in *Lichter*, affect the question whether there were "any" renegotiable profits within the meaning of the statute. All such issues are for the Tax Court.

2. The conflict purportedly found by the petitioner between the decision below and that of the

Court of Appeals for the Second Circuit in *United States* v. *Wissahickon Tool Works,* 200 F. 2d 936 (C.A. 2) is nonexistent. The latter case, like the present, was an action by the Government to recover the amount of profit determined by the War Contracts Price Adjustment Board to be excessive; and the defendants, not having exhausted the Tax Court remedy, sought to raise as a defense the issue of whether renegotiation had been timely commenced. The district court granted summary judgment for the Government, and on appeal the defendants again raised the issue of timely commencement. The Government urged, as the petition for rehearing below plainly shows (R. 86), alternative grounds for affirmance: —(1) that the renegotiation had in fact been timely commenced and (2), as in this case, that in any event failure to exhaust the Tax Court remedy barred the defendant from raising the issue. The Court of Appeals for the Second Circuit held that on the face of the pleadings it was plain that the commencement of renegotiation had in fact been timely and affirmed on that ground. The court therefore found no need to advert to the second ground of whether the question of timely commencement could properly be raised in the district court. On this issue, the court — far from upholding the petitioner's view—made no comment whatever.

3. The petitioner's contentions (Pet. 12) that the construction given the statute by the court below, and clearly indicated by the prior decisions of this Court, deprives the petitioner of constitutional rights are wholly unfounded. The power of Congress to require exhaustion of the Tax Court remedy as a prerequisite to obtaining judicial review of a question was settled by the *Lichter* case (see 334 U.S. at 791).[2] Indeed, it is clear that there is no constitutional bar to the power of Congress to place even questions of constitutionality, as well as questions of coverage and of the timeliness of renegotiation proceedings, within the exclusive original jurisdiction of the Tax Court. *Lockerty* v. *Phillips,* 319 U.S. 182; *Yakus* v. *United States,* 321 U.S. 414, 444.[3]

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[2] It is, of course, unnecessary to consider questions of the constitutionality of refusing all review after exhaustion of the Tax Court remedy. See fn. 1, *supra*, p. 7.

[3] The cases cited squarely dispose of the contention that Section 403(c) (1) (*infra*. p. 15) denies the petitioner due process. The petitioner's reliance on Article III of the Constitution (Pet. 12) is likewise unfounded. It is well settled that it is no legislative invasion of the power of the judiciary to require defenses to be raised in the first instance in an administrative tribunal or a specified court. *Lockerty* v. *Phillips,* 319 U.S. 182; cf. *Murray's Lessee* v. *Hoboken Land & Improvement Co.,* 18 How. 272.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1954.

APPENDIX

The pertinent provisions of the Renegotiation Act, as amended by Title VII of the Revenue Act of 1943, 58 Stat. 78, 50 U.S.C. App. 1191, read as follows:

> SEC. 403(c)(1)—Whenever, in the opinion of the Board, the amounts received or accrued under contracts with the Departments and subcontracts may reflect excessive profits, the Board shall give to the contractor or subcontractor, as the case may be, reasonable notice of the time and place of a conference to be held with respect thereto. The mailing of such notice by registered mail to the contractor or subcontractor shall constitute the commencement of the renegotiation proceeding. * * * If the Board does not make an agreement with respect to the elimination of excessive profits received or accrued, it shall issue and enter an order determining the amount, if any, of such excessive profits, and forthwith give notice thereof by registered mail to the contractor or subcontractor. In the absence of the filing of a petition with The Tax Court of the United States under the provisions of and within the time limit prescribed in subsection (e)(1), such order shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency. * * *

SEC. 403(c)(2)—Upon the making of an agreement, or the entry of an order, under paragraph (1) by the Board, or the entry of an order under subsection (e) by the Tax Court of the United States, determining excessive profits, the Board shall forthwith authorize and direct the Secretaries or any of them to eliminate such excessive profits (A) by reductions in the amounts otherwise payable to the contractor under contracts with the Departments, or by other revision of their terms; or (B) by withholding from amounts otherwise due to the contractor any amount of such excessive profits; or (C) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to a subcontractor, any amount of such excessive profits of such subcontractor; or (D) by recovery from the contractor, through repayment, credit, or suit any amount of such excessive profits actually paid to him; or (E) by any combination of these methods, as is deemed desirable. Actions on behalf of the United States may be brought in the appropriate courts of the United States to recover from the contractor any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection. * * *

SEC. 403(c)(3)—No proceeding to determine the amount of excessive profits shall be commenced more than one year after the close of the fiscal year in which such excessive profits were received or accrued, or more than one year after the statement required under paragraph (5) is filed with the Board, whichever is the later, and if such proceeding is not so commenced, then upon the expiration of one year following the close of such fiscal year, or one year following the date upon which such statement is so filed, whichever is the later, all liabilities of the contractor or subcontractor for excessive profits received or accrued during such fiscal year shall thereupon be discharged. If an agreement or order determining the amount of excessive profits is not made within one year following the commencement of the renegotiation proceeding, then upon the expiration of such one year all liabilities of the contractor or subcontractor for excessive profits with respect to which such proceeding was commenced shall thereupon be discharged, except that (A) if an order is made within such one year by the Secretary (or an officer or agency designated by the Secretary) pursuant to a delegation of authority under subsection (d)(4), such one-year limitation shall not apply to review of such order by the Board,

and (B) such one-year period may be extended by mutual agreement.

* * * * * * *

SEC. 403(e)(1)—Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c)(1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. * * *

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IN THE

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OCTOBER TERM, 1953

No. 573

EDWARD VALVES, INC., *Petitioner,*

v.

THE UNITED STATES OF AMERICA.

REPLY BRIEF FOR EDWARD VALVES, INC., PETITIONER.

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